The War Powers Resolution

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A National War College Strategic Study

National Defense University

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Balance of War Powers In the Eighties

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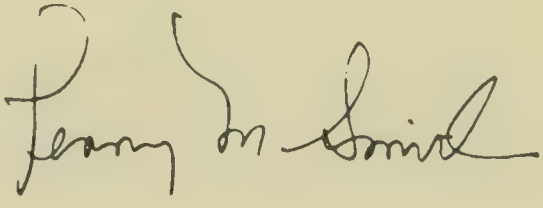
CONTENTS

FOREWORD

The War Powers Resolution, enacted over Presidential veto in 1973, poses dilemmas for the President and for the Congress. The controversial Resolution restricts the President's ability to wage prolonged, undeclared war, despite his constitutional authority as Commander in Chief. Members of Congress, on their side, insist on keeping the Resolution as at least a symbol of their constitutional authority to declare war. Neither branch of government wishes to concede to the other. Meantime, the courts remain hesitant to intervene in disputes between the Executive and Legislative branches over a significant overlap in constitutional powers.

These dilemmas are examined in this study by a group of National War College students. After looking at the constitutional issues the authors examine Presidential compliance with the Resolution in specific cases, including the recent deployments of troops to Grenada and Lebanon. The authors conclude that major disputes have been and will continue to be settled through the political realities of the moment and the press of events, not through abstract constitutional law. Nonetheless, the authors agree that the War Powers Resolution will remain in effect if only for its symbolic worth.

When a state can use its military force and *who* can authorize that use of force are always at issue in the study of international politics. The War Powers Resolution raises these issues within the US Government. The National War College is pleased to offer this analysis to the national security community.



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The War Powers Resolution

PRESIDENT VERSUS CONGRESS: WAR POWERS DEBATE

> The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.
>
> Alexander Hamilton, *The Federalist,* No. 23

IN THIS RESEARCH REPORT we examine the application of the War Powers Resolution since its enactment over President Nixon's veto in 1973.[1] (The War Powers Resolution is reproduced in its entirety here as appendix A.) We do this examination because no single piece of legislation has been so controversial in the debate concerning the war powers of the President and the Congress.[2] If we review the past decade we find that the authority of Presidents to commit military forces to hostilities without prior congressional approval has been an important part of American foreign policy. More recent events in Lebanon and Grenada have highlighted this fact and renewed the controversy over the President's authority to use military force in circumstances short of full-scale war.

Much of this debate stems from Congress's attempt "to take away, by a mere legislative act, authority which the President has properly exercised for almost 200 years."[3] Furthermore, some observers believe that the decisions of the United States Supreme Court in *Immigration and Naturalization Service*

v Chadha and *United States Senate v Federal Trade Commission,* holding the one– and two–House legislative vetoes unconstitutional have affected the operation of the War Powers Resolution and altered the delicate balance in the exercise of war powers under the Constitution.[4]

With this in mind, we review presidential compliance with the War Powers Resolution in the last decade and examine the degree to which the President and the Congress have acted together in matters pertaining to war powers. Finally, we assess the possibility of judicial review of presidential compliance and examine recent events in Lebanon and Grenada to determine if they suggest the roles that the Congress and the President will play in the future.

War Powers Background

The controversy over the War Powers Resolution concerns the President's constitutional authority to commit military forces to hostilities without prior authorization by Congress. Supporters of presidential authority argue that the President has constitutional authority as Commander in Chief, while proponents of congressional approval argue Congress's constitutional authority to declare war. But of more relevance is the argument that the *combination* of war powers provides for the sovereign integrity of the nation; the war powers are complete, total, and adequate when both the Congress and the President act in concert.[5]

In this argument, as a former Secretary of State once noted, the exercise of war powers essentially is a political process that requires cooperation and mutual trust between the President and the Congress. Although the Constitution gives the President and the Congress war powers appropriate to each of their roles, the political process pinpoints the function each will play under particular circumstances.[6]

Article II, Sections 1, 2, and 3 of the Constitution provide that "The Executive Power shall be vested in a President," that "The President shall be Commander in Chief of the Army, and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States," and that "he shall take care that the Laws be faithfully executed."

Article I, Section 8 of the Constitution grants Congress the power to "declare War," to "raise and support Armies," and to "provide and maintain a Navy." In addition, Article I, Section 8 provides that Congress shall have the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof."

Collective Judgment Intended So, although the Constitution grants Congress the power to declare war and to raise and support armies, the President, as Commander in Chief, has the exclusive power to wage war and to command and control the armed forces in both peace and war. Since one power is incomplete without the other the Framers of the Constitution must have intended that military action represent the collective judgment of the Congress and the President.

On the other hand, much justification exists that the President derives inherent authority not only from his position as Commander in Chief, but also from the provisions of Article II, which vest in him the "executive power" and require him to "take care that the laws be faithfully executed." For example, a precedent establishes that the duties of the Chief Executive include the power to protect American citizens and property abroad.[7] According to some observers, more than 200 incidents have involved threats to American lives, property, and oversea interests, in which Presidents have used defensive force without a declaration of war or congres-

sional policy restrictions.[8] We can trace the source of the President's power in every instance to the constitutional powers vested in him by Article II.

The Supreme Court has concluded that the President's powers in foreign affairs are inherent. The Court has stated that in international relations Congress must "accord to the President a degree of discretion and freedom from statutory restriction were domestic affairs alone involved."[9] For example, the Truman administration's justification for committing military forces to the Korean "police action" without declaring war was based on the President's constitutional authority as Commander in Chief to protect the broad foreign policy interests of the United States.[10] The fact that US forces were employed in Korea without a declaration of war never was directly brought before the Supreme Court.

Public discussion, congressional debate, and committee hearings on the North Atlantic Treaty also raised questions about the President's power to send forces outside the United States. The Executive Department replied with a legal memorandum that addressed the issue in the context of Korea and the North Atlantic Treaty.[11] The administration believed that the President's powers came from those provisions of Article II, Section 2 of the Constitution that make him Commander in Chief, give him special responsibilities in the field of foreign affairs, and charge him to take care that the laws be faithfully executed. The memorandum used the protection of US citizens or their property abroad as the rationale for ordering armed forces abroad in the absence of war, organized hostilities, or congressional authorization.[12]

Later, the legal adviser for the Department of State justified the use of US military forces in Vietnam under the President's authority and duties as Chief Executive and Commander in Chief, as well as his prime responsibility for the conduct of US foreign relations.[13] Since adoption of the War Powers Resolution many Presidents have used a similar

rationale to justify unilateral deployment of military forces overseas.

War Powers Resolution

This analysis of the war powers of the Congress and the President aids us in a detailed examination of the War Powers Resolution and an evaluation of presidential compliance with it.

To begin, we must remember that the Resolution was enacted near the end of the Vietnam War by a Congress that reemphasized its constitutional right to decide when the United States would become involved in a war or in a situations in which the use of armed force might lead to war. Enacted over President Nixon's veto in 1973, the War Powers Resolution was viewed by Congress as an exercise of its constitutional "war" and "necessary and proper" powers in a way that would ensure "that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated."[14]

- *Section 2* of the Resolution states that the President's constitutional power to commit US troops to actual or imminent hostilities is limited to a declared war, a specific statutory authorization, or a national emergency created by attack on the United States, its territories or possessions, or its armed forces.

- *Section 3* directs the President "in every possible instance" to consult with the Congress before committing US armed forces to actual or imminent hostilities.

- In the absence of a declaration of war *Section 4* requires the President to report to the Congress within 48 hours when

he introduces troops into actual or imminent hostilities; into a foreign nation while equipped for combat, except in certain nonhostile situations; or in numbers that substantially enlarge US combat troops already located in a foreign nation.

• *Section 5* is the heart of the War Powers Resolution and sets further limits on the President's use of US troops in the absence of a declaration of war. This section requires the President to terminate the use of troops in a specific situation within 60 days after the initial report, unless Congress has declared war, extended the time period, or is unable to convene because of an attack on the United States. In other words, if at the end of this period Congress has not authorized the President to continue hostilities he must order the troops withdrawn. However, Congress can extend the period another 30 days if the President certifies to it that the troops' safety is in jeopardy.

Congress may, by passing a concurrent resolution, require the President to remove the troops sooner.[15] In this case such a concurrent resolution serves as a legislative veto.

• *Section 8* provides that any legislation, whether enacted before or after adoption of the War Powers Resolution, specifically must authorize the President to introduce troops into actual or imminent hostilities before he can do so. Furthermore, no treaty may empower the President to deploy troops unless the treaty is accompanied by specific legislation on that issue.

• *Section 9* contains a "separability clause" that provides that if any provision of the joint resolution is held invalid, the remainder will not be affected.

The attempt by Congress to restrict the war powers of the President by legislation raises certain constitutional issues. Specifically, are parts of the War Powers Resolution unconstitutional? And is it likely to cause a constitutional crisis

between the President and the Congress at the wrong moment?

In his veto message President Nixon cautioned that the Resolution's restrictions on the President's authority were "both unconstitutional and dangerous to the best interests of the nation." The President reasoned that Congress could fail to extend certain presidential authorities after a specified period of time and, so, cut them off. He felt that Congress also could eliminate certain other authorities by passing a concurrent resolution that would deny a President his constitutional role in approving legislation. The veto message further underscored President Nixon's concern that the War Powers Resolution would weaken authorities that Presidents have used for humanitarian relief missions, protecting fishing boats from seizure, dealing with ship or aircraft hijackings, and responding to threats of attack.[16]

Implicitly, the War Powers Resolution rejected the idea that the President has independent authority under the Constitution to evacuate or use force to protect American citizens abroad even though, as we have observed, the idea has become generally accepted practice for many Presidents.[17]

Failure to Act is a Concern The constitutional issues President Nixon noted in his veto message also were raised in the minority and supplemental views of members of the Committee on Foreign Affairs.[18] They were concerned that Congress's option to terminate some aspects of presidential authority by failing to act at all was unconstitutional and dangerous. They believed that Congress should exercise its power in a positive way, rather than create major consequences from its inaction. They also were concerned that a concurrent resolution could require the President to remove combat forces from battle. As the committee noted in its minority view,

> By seeking to provide that a concurrent resolution shall have the force of law, we are embarking on an extremely dangerous, and probably unconstitutional course of action.[19]

The War Powers Resolution has yet to be tested in a period of prolonged hostilities, although it has been described as "probably the most potentially damaging of the 1970s legislation aimed at curbing Presidential power."[20] Nevertheless, events during the Reagan administration and the record of previous presidential compliance allow us to predict how effective the War Powers Resolution will be in the future. For reasons we will discuss later the War Powers Resolution should be modified, since little chance exists that it will be repealed. As Senator John Tower of Texas told the Senate in 1980, "The War Powers Act ... is like motherhood and Sunday School and apple pie, something you just cannot vote against."[21]

CONSTITUTIONAL ISSUES

TWO MAJOR CONCERNS affect the future of the War Powers Resolution. One is the constitutionality of its enforcement provisions; the other is the willingness of a President to comply with those provisions. In this chapter we examine the constitutional issues that have led many to ask whether the War Powers Resolution really can bring the President and the Congress together in war powers matters.

LEGISLATIVE VETO

Article I, Section 1 of the US Constitution provides:

> All Legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 7 of the Constitution provides:

> Every Bill which shall have passed the House of Representatives and the Senate shall, before it becomes a Law, be presented to the President of the United States.

The Supreme Court, in *Immigration and Naturalization Service v. Chadha* (decided June 23, 1983), held unconstitutional the one-House legislative veto which permitted either House of Congress, by resolution, to invalidate an executive decision made with congressional authority. The Court based its decision on the bicameralism and presentment requirements of Article I, Sections 1 and 7 of the US Constitution.

The Court apparently concluded that the constitutional requirements for bicameral consideration and presentation to the President are required for *all* exercises of the legislative power that will "alter the legal rights, duties, and relations of persons ... outside the legislative branch." The decision further stated that "the prescription for legislative action in Art I, 1, 7 represent the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered procedure."[1]

The Court's analysis of the issue, then, apparently invalidates any legislative veto that "alters the legal rights, duties, and relations of persons ... outside the legislative branch."[2] Shortly after the *Chadha* decision the Supreme Court decided *United States Senate v Federal Trade Commission* and held unconstitutional a two-House veto provision, applying the *Chadha* rationale.[3] The broadest interpretation of these decisions suggests that all legislative vetoes are unconstitutional and may not be used to terminate powers delegated to the President or to disapprove a particular exercise of power by him.

Legal scholars who have assessed the impact of the *Chadha* decision on the War Powers Resolution generally agree with this interpretation. Therefore, Congress no longer is able to end US troop involvement during the initial 60-day period by concurrent resolution.[4] However, some observers believe that the *Chadha* decision does not affect the War Powers Resolution.[5] They argue that the Resolution does not delegate legislative power to the executive. Instead, Congress's power to require the President to recall US troops after a specified time is based on its exclusive power to declare war. One commentator has stated that the legislative veto

> does not convey upon Congress a power which it did not already have. Thus, the reasonable conclusion is that the exercise of the legislative veto provision ... does not represent law-making by the Congress. Instead the veto rep-

> resents the issuance of guidelines or a policy decision relating to congressional power as invested in it by the Constitution.[6]

In other words, because Congress did not delegate authority the *Chadha* rationale does not apply to the "legislative veto" mechanism of the War Powers Resolution.

Political Question Doctrine

Although a persuasive argument may be made that the legislative veto mechanism still is valid the matter likely will not be resolved in the courts. The reason is that the courts must find a legal question in order to test the War Powers Resolution. This requirement stems from the "political question" doctrine, which is the principle that Federal courts do not decide questions that the Constitution places in the exclusive domain of the political branches of government (the executive or legislative branches). So, consistent with the idea of separation of powers, when the Constitution commits the power to decide a matter exclusively to a political branch that matter is not within the judiciary's jurisdiction.[7] This formulation of the political question doctrine first appeared in the Supreme Court's opinion in *Marbury v Madison* and more recently in *Baker v Carr*.[8] Justice Brennan, speaking for the Court in the latter case, noted the factors which make a question "political" and inappropriate for judicial decision. He found that the "nonjusticiability of a political question is primarily a function of the separation of powers."[9]

The *Carr* decision notes several types of "political questions," which seem to include issues posed by the War Powers Resolution and a President's use of force abroad without congressional consent. For instance, the courts during the Vietnam era clearly indicated their adherence to the political question doctrine when they regularly declined to decide whether the US involvement in Vietnam was constitutional.[10]

Since then, the courts' reluctance to decide constitutional war powers issues continues.

For example, some members of Congress recently filed suit in the United States District Court for the District of Columbia seeking judgments that the actions of the President and Secretaries of Defense and State in supplying military aid to El Salvador violated the War Powers Resolution and the Foreign Assistance Act. The 24 members of Congress alleged that US military forces in El Salvador were placed in situations involving imminent hostilities. Additionally, they asserted that US forces were illegally participating in the war effort in El Salvador because the Constitution grants only the Congress the power to declare war.

Fact-Finding Required In *Crockett v Reagan* the court held the case to be nonjusticiable because of the fact-finding that would be required. In applying the *Carr* criteria the court found no standards for resolution that properly could be found and used by judicial means.[11] However, the court observed that in circumstances when the President fails to file the report required by Section 5(b) of the War Powers Resolution, the Resolution permits Congress to take action before the automatic termination provision becomes operative. Therefore,

> were Congress to pass a resolution to the effect that a report was required . . . or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented.[12]

This decision is significant for it applies the political question doctrine to the War Powers Resolution and reaffirms the court's reluctance to consider the constitutional war powers issue. Therefore, Congress should resolve any doubt over the constitutionality of the legislative veto provision by amending

the War Powers Resolution to make it conform to requirements of the *Chadha* decision. Should Congress not do so, and attempt to trigger the withdrawal provision with a concurrent resolution, the courts could avoid the "constitutional impasse appropriate for judicial resolution." The courts simply could apply the political question doctrine and find the concurrent resolution veto mechanism unconstitutional, citing *Chadha* and related cases. In this manner they could avoid the decision on the more difficult constitutional war powers issue.

Put another way, courts will continue the tradition set during the Vietnam era and decline when possible to define the limits of the war powers of the Congress and the President. However, should Congress first decide that *Chadha* does not apply to the War Powers Resolution and then fail to amend the Resolution to comply with the *Chadha* mandate, the courts probably will decide the matter on the legislative veto provision. In such circumstances the provision surely will be found unconstitutional.

Congressional Recourse The safest recourse for Congress is to amend the War Powers Resolution to provide for a joint resolution, subject to presidential veto, instead of the questionable concurrent resolution. The Senate considered an amendment to this effect in the 98th Congress as an addition to the State Department authorization bill.[13] The Senate amendment would have altered the War Powers Resolution to require a joint resolution before the President has to remove US armed forces. This amendment speeded up the process to pass such a resolution. However, the conference committee substituted a separate provision of law that stipulated that any such joint resolution or bill will be considered in accordance with procedures of Section 601(b) of the International Security Assistance and Arms Export Control Act of 1976. Not only could the resolution or bill be amended, but if it were vetoed by the President, the time to debate the veto message would be limited to 20 hours in the Senate.[14] The authoriza-

tion bill as reported out of conference was enacted into law as Public Law 98-164, November 22, 1983.

No clear reason is seen for the conference committee's final failure to amend the War Powers Resolution. Clearly, the Senate amendment was designed to conform the Resolution to the *Chadha* mandate. The amendment would have required Congress to present a joint resolution to the President, who could submit a veto which Congress then could override.[15] Amending the War Powers Resolution in this fashion would have settled one of the legal issues over the constitutionality of its provisions. We must assume from the conference committee's action that Congress is not ready to concede the ineffectiveness of the Resolution's enforcement provision.

On the other hand, Congress need not give in until the issue is tested in the courts. This approach probably explains why the War Powers Resolution has been in effect for a decade and Congress has neither directed the withdrawal of troops nor finally amended the Resolution, despite efforts to do so. The War Powers Resolution is symbolic of congressional resurgence in matters of war, peace, and foreign affairs, and many members of Congress believe it is viable, at least until experience proves otherwise. Therefore, Congress is unlikely to consider any changes to the Resolution until it has been tested and found ineffective.[16]

Use of Joint Resolution While the War Powers Resolution remains intact the *Chadha* decision will cause future Congresses to use a joint resolution (as provided for in the State Department authorization bill) to compel the President to withdraw troops from hostilities. Congress certainly would want to avoid a court battle over the constitutionality of a concurrent resolution directing withdrawal of combat troops. Furthermore, a joint resolution under such circumstances shares power, which is consistent with the constitutional balance of power between the two branches of government.

Although our focus so far has been on the continued vitality of the concurrent resolution mechanism we also must discuss whether legislative veto provision can be separated from the Resolution itself. The critical question here is whether Congress would have enacted the Resolution over the President's veto had it not included the legislative veto provision. If the answer is no, the legislative veto section may be inseparable from other portions of the Resolution. In this case the legal issue of "severability" becomes critical to an analysis of the War Powers Resolution in light of the *Chadha* decision. To put it simply, the *entire* War Powers Resolution may be found unconstitutional if the valid portions of it cannot be "severed" or "separated" from the unconstitutional portion.

To resolve the severability issue we must consider three factors.[17] These factors include whether a severability clause is contained in the statute, whether the legislature intends separability, and whether the statute can work without the "severed part." In other words, if the War Powers Resolution is not fully functional without the legislative veto the entire Resolution must fail. This approach requires a case-by-case analysis based on the language of the legislative measure, its legislative history, and its ability to function without the "severed" portion. The ultimate question, of course, is whether the Congress would have enacted the legislative measure without the portion that a court may find unconstitutional.[18]

In the *Chadha* decision the Supreme Court held that the legislative veto provision in the Immigration and Nationality Act was severable from the remainder of the Act. The presence of a severability clause indicated a severability consistent with both the legislative history of the Act and congressional intent.[19] As the Court stated in *Chadha,*

> This language is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend upon whether the veto clause ... was invalid. The ... veto pro-

> vision ... is clearly a 'particular provision' of the Act as that language is used in the severability clause. Congress clearly intended 'the remainder of the Act' to stand if 'any particular provision' were held invalid. Congress could not have more plainly authorized the presumption that the provision for a ... veto ... is severable from the ... Act of which it is a part.[20]

This decision is significant because the War Powers Resolution contains a severability clause almost identical to the one in the Immigration and Nationality Act.[21]

So, as one commentator has noted, the Court's observation is particularly appropriate with regard to the legislative veto provision in the War Powers Resolution.[22] This reason is because the severability clause applies to "any provision" and the "subsection which provides for a legislative veto relates exclusively to the veto and nothing else."[23] Section 5(c) is independent of the reporting and time requirements set forth in Sections 5(a) and (b). Furthermore, the Resolution claims neither to be a delegation of authority nor an effort to alter the constitutional authority of the President.[24] This view appears to eliminate the usual question of whether without the legislative veto provision Congress would have delegated the authority.

Key to Disapproval Action More troublesome is the legislative history of the War Powers Resolution. Clearly, the concurrent resolution was intended as the key by which the Congress could disapprove an action by the President to commit US armed forces to hostilities. Simply put, it would avoid a possible presidential veto or impasse created by a bill or joint resolution.[25] We also should remember that Congress enacted the War Powers Resolution over President Nixon's veto, which cited the objectionable features of the legislation, particularly the legislative veto provision.[26] Nevertheless, Congress insisted that the legislative veto would be the mechanism to counter

presidential "war powers" decisions. At the same time, it viewed the Resolution as "reaffirming the constitutionally given authority of Congress to declare war" and as "outlining arrangements which would allow the President and Congress to work together . . . toward their ultimate shared goal of maintaining the peace and security of the Nation."[27] Therefore, Congress's desire to assert its share of the "war powers" was as important a factor in the legislation as the veto mechanism. This point unmistakably is confirmed by the legislative history.

Other provisions of the War Powers Resolution ensure that the "collective judgment of both the Congress and the President will apply to the introduction of US armed forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated."[28] These situations include requirements for advance consultation, formal reports, and congressional authorization either at the beginning or within the first 60 days of hostilities. Obviously, the periodic consultations and presidential reports to Congress contribute to the Resolution's objectives. Furthermore, given the context of the Resolution, Congress obviously was concerned with prolonged involvement in hostilities without a declaration of war or specific congressional authorization. So troop withdrawal within the initial 60 days of hostilities loses significance.[29] Congress meets its paramount concern—to preclude prolonged, undeclared war—in the requirement to take positive action if the use of troops is to continue beyond 60 days. Therefore, while it is an important aspect of the War Powers Resolution the legislative veto is only one of its operative features.

Will it Work Without the "Severed Part"? The third of the severability factors is whether the legislative measure will work without the "severed part." As we have seen, the important provisions of the War Powers Resolution work very well. Even without the veto provision, the

> President must consult with Congress in advance of taking action and he must report and justify his action to Congress.... He may not introduce troops into actual or potential hostilities and keep them there longer than 60 days unless he receives express statutory authority or a declaration of war from Congress.[30]

At this point, then, we see that the criteria for determining severability favor severance, and the War Powers Resolution will work without the legislative veto provision. Congress need not lament the loss of the legislative veto because it only would have been used to remove US armed forces during the first 60 days of hostilities. As a practical matter this move would have been unlikely because of the following:

> Only in the most extraordinary of political circumstances will Congress defy a sitting President who has introduced troops on his own. Realistically, Congress is not going to rally even a simple majority for a veto resolution unless the President has gone off the deep end, introducing troops in a way clearly and immediately condemned by the overwhelming majority of the public. And if the President's error is that manifest ... Congress not only will assemble a majority to disapprove the troop deployment but also, almost surely, can put together a two-thirds majority to pass, over a presidential veto, full-scale legislation that forces withdrawal of the troops.[31]

PRESIDENTIAL COMPLIANCE

IN ITS FIRST DECADE the War Powers Resolution never has been tested in prolonged hostilities involving US armed forces. This fact is significant because the Resolution is not a compromise between the two branches of government to allocate war powers. Rather, it was imposed on a hostile President by an equally hostile Congress. Given these factors executive compliance in the last decade and opinions about the meaning and scope of the War Powers Resolution indicate the role of Congress in the decade to come.

Since its enactment every President has charged that the War Powers Resolution is unconstitutional; however, no President has completely ignored it. Nor have they failed to appreciate it as a symbol of the role that Congress wishes for itself in matters of war, peace, and foreign affairs. So the ultimate measure of success for the War Powers Resolution is presidential compliance. We can determine this compliance from the following:

- Presidential consultations with Congress prior to the introduction of troops into actual or imminent hostilities.

- Reports required by the Resolution.

- Analysis of circumstances in which deployed troops would require congressional authorization to remain deployed beyond 60 to 90 days.

Since the War Powers Resolution was enacted in 1973, 11 "reports" have been made to Congress. On four other in-

stances US armed forces were used abroad and reports were not made by the incumbent President. By analyzing these incidents we gain some insight into the role that the War Powers Resolution will play in the rest of the decade.

Nixon and Ford Administrations

The administrations of Presidents Nixon and Ford first established the pattern for presidential compliance. For example, no record exists of any significant prior consultations with the Congress nor was any War Powers Resolution report filed when US Marine helicopters evacuated US civilians and other nationals from Cyprus in 1974.[1] The Department of Defense (DOD) claimed that a report was not required because the areas where the helicopters landed were not part of a hostile zone, the mission was humanitarian in nature, and the US forces were not equipped for combat.[2]

In a similar manner, DOD argued that aerial resupply and reconnaissance missions over Cambodia in 1974 merely represented US armed forces in an area where hostilities were taking place and, without their direct involvement, did not trigger a report. These early efforts to interpret the War Powers Resolution showed that Presidents will not unilaterally invoke the Resolution. Instead, they will tend to downgrade the risk to US military personnel and will stress factors that suggest that the Resolution does not apply, such as the fact that US forces are unarmed or not equipped for combat.[3] In fact, no President ever has invoked the War Powers Resolution.

The first challenge to the War Powers Resolution occurred in 1975 with the fall of Indochina to communist forces. In April 1975 President Ford reported to the Congress that he had directed US participation in an international humanitarian effort to transport refugees from Danang and other seaports to safer areas in Vietnam. He also reported the

use of armed forces to assist in the evacuations of Cambodia and South Vietnam. In every instance he cited his constitutional authority as Commander in Chief and as Chief Executive in the conduct of foreign affairs.[4]

Apparently, he believed that he had independent constitutional authority, unconstrained by the War Powers Resolution, to deploy US armed forces to protect American citizens. Because the procedures set out in the Resolution are first activated by the reports required in Section 4 it is significant that in each of President Ford's three reports he stated that he was "taking note" of Section 4 and that he was reporting in accordance with his "desire to keep the Congress fully informed" in the matter.[5] This ambiguous language made it unclear whether the President was accepting the authority of the Resolution. Obviously he was not, for in a 1977 speech the former President claimed that the Resolution did not apply to these instances nor was it binding on constitutional grounds. However, he acknowledged that he noted its consultation and reporting provisions by providing information to certain key congressional leaders.[6]

The Mayaguez is Recaptured On May 15, 1975, President Ford reported to Congress that he had ordered US armed forces to recapture the SS Mayaguez and rescue its crew from Cambodia. He stated that he acted from his "desire that the Congress be informed on this matter and taking note of Section 4(a)(1) of the War Powers Resolution." In the report he advised that the ship had been recaptured, the crew recovered, and that US forces were in the process of disengagement and withdrawal. As before, he cited as his authority "the President's constitutional Executive power and his authority as Commander in Chief of the United States Armed Forces."[7] But regardless of the President's interpretation the following two issues arose from the Mayaguez incident:

(1) Was there adequate consultation with Congress?

(2) Was the President acting within his constitutional authority as Chief Executive and Commander in Chief when he directed the rescue effort?

The Congress believed that consultation had been unsatisfactory and that it had been excluded from any real involvement in the Mayaguez crisis. The Members had three primary complaints, as follows:

(1) The administration was in touch with congressional leaders only through relatively low-level liaison aides who read them prepared statements.

(2) They were notified after the fact.

(3) The lack of executive-legislative rapport because the President failed to seek counsel from members of Congress.[8]

The administration replied that the President believed that by informing Congress of his actions he had satisfied the requirement of the War Powers Resolution.[9] Significantly, former President Ford since has said that when a crisis breaks it is impossible to involve Congress effectively in the decisionmaking process.[10]

The second major issue generated by the Mayaguez incident concerned the authority of the President to send US armed forces into hostilities to rescue the ship and crew without formal congressional authorization. President Ford maintained that he had constitutional authority as Commander in Chief, unrestricted by the War Powers Resolution, to deploy troops to protect US citizens. As we discussed in the first chapter, "President Versus Congress: War Powers Debate," ample precedents exist for this position, although it is less clear whether this authority includes the rescue of foreign nationals as well. Consistent with President Ford's view the formal report to the Congress stated that the operation was ordered and conducted "pursuant to the President's constitu-

tional Executive power and his authority as Commander in Chief." Significantly, the majority in Congress supported the President and believed that his action was proper under the Commander in Chief clause of the Constitution.[11]

Combat Situations Listed The Mayaguez incident further identified problems in the relationship between the two branches during time-sensitive international crises. Consultation is an obvious example. Of perhaps greater import is the matter of when the President may rely on his inherent constitutional authority to commit US military forces into hostilities in situations other than those specified in Section 2(c) of the War Powers Resolution. After the Mayaguez incident the State Department legal adviser provided the Congress with the following list of situations in which the President would have inherent authority, as Commander in Chief, to direct US military forces into combat:

(1) To rescue American citizens abroad.

(2) To rescue foreign nationals where such action directly facilitates the rescue of US citizens abroad.

(3) To protect US embassies and legations abroad.

(4) To suppress civil insurrection in the United States.

(5) To implement and administer the terms of an armistice or cease-fire designed to terminate hostilities involving the United States.

(6) To carry out the terms of security commitments contained in treaties.[12]

Furthermore, the President made it clear that this list was not inclusive because it could not include every possible situation in which the President's authority as Commander in chief could be exercised. The Sullivan Study cites this view as the "most definite statement of the Ford administration's view of Presidential powers, and a potential precedent for citation by future administrations." The study also concedes that most

members of Congress would agree with the President's right to rescue American citizens.[13]

Two other unreported incidents occurred during the Ford administration that raised War Powers Resolution issues.

- A Navy landing craft was used to evacuate 263 Americans and Europeans from Lebanon in June 1976.
- In August 1976, in response to the killing of two US Army servicemen in the Korean demilitarized zone, the President sent additional military forces—primarily a squadron of 20 F-111s and 18 F-4s—to Korea.

In the first instance the US forces were unarmed or, in the words of Section 4(a)(2), they were not "equipped for combat." In the second incident the administration wished to avoid a precedent which interpreted the Resolution to require a report when a "relative handful" of people had been added to the troops already stationed in Korea.[14] This approach also suggests the executive branch's view that increases in US armed forces which trigger the reporting requirements of Section 4(a)(3) should be considered increased troop strength and not increased military equipment.

Carter Administration

The Carter administration's experience with the War Powers Resolution gives us additional insight into the Resolution's future. During this period two incidents raised War Powers Resolution issues. The President did not report the first, but did report the second.

In 1978 the United States sent transport aircraft to support French and Belgian rescue operations in Zaire. The operation lasted about a month. President Carter did not submit a report under the War Powers Resolution, and in a press conference he said that he had ordered the rescue "pursuant to present law and under my constitutional powers and duties as

Commander in Chief."[15] In August the House Foreign Affairs Committee held hearings on the issue of compliance with the War Powers Resolution. The administration argued that the aircraft were not involved in hostilities because they landed in secure areas more than 100 miles from the sites of the conflict, nor were the US personnel equipped for combat.[16] In general, Congress was satisfied with the administration's position.[17]

The major foreign policy crisis of the Carter administration was the hostage situation in Iran. President Carter reported to Congress on April 26, 1980, that on April 24 an unsuccessful attempt had been made to rescue the American hostages in Teheran. The report was based on his "desire that Congress be informed on this matter" and was made "consistent with the reporting provisions of the War Powers Resolution."[18]

Significantly, the report stated that the operation was within "the President's powers under the Constitution as Chief Executive and as Commander in Chief of the United States Armed Forces, expressly recognized in Section 8(d)(1) of the War Powers Resolution."[19] President Carter further stated that the United States was acting wholly within its right in accordance with Article 51 of the United Nations Charter, "to protect and rescue its citizens where the government of the territory in which they are located is unable or unwilling to protect them."[20]

Congress Not Notified Before Operation Started President Carter reported to Congress within 48 hours of introducing combat forces into a foreign country. He cited his authority under the Constitution as Chief Executive and Commander in Chief, as had President Ford before him. However, he also asserted that these presidential authorities expressly were recognized in Section 8(d)(1) of the War Powers Resolution, which states that nothing in it "is intended to alter

the constitutional authority of the Congress or of the President." Congress's only concern was the President's failure to notify Congress before beginning the operation.[21]

The administration's reply was a legal opinion from Attorney General Benjamin Civiletti saying that "the President has the constitutional authority within the resolution for rescue missions, authority provided by the Constitution, case law, and the legislative history of the resolution."[22] The President's legal counsel, Lloyd Cutler, further emphasized that the President's constitutional power to use the armed forces to rescue Americans illegally detained abroad clearly has been established (citing *In re Neagle*, 135 US 1 (1889), and *Durand v Hollings*, 8 Fed. Cases 111 (1860)) .[23] Furthermore, the President's inherent constitutional power to conduct a surprise rescue operation includes the power to act before consulting Congress, if he concludes that such consultation would endanger the success of the operations.[24] Finally, and perhaps most significantly, the opinion presented a novel view of the Resolution's Section 8 that negated the consultation requirements of Section 3. The administration interpreted the language in Section 8(d)(1) that nothing in the Resolution was "intended to alter the constitutional authority of the Congress or of the President" to mean that the consultation requirement in Section 3 did not apply when the President relied on his own inherent constitutional authority for the operation at hand.

In other words, rescue operations conducted under the President's inherent constitutional authority cannot be limited by provisions of the War Powers Resolution. The Carter administration's position was that rescue missions, such as that attempted in Iran, lay beyond the scope of the War Powers Resolution.[25] In many respects this approach to the War Powers Resolution was very similar to that of the Ford administration.

Reagan Administration

The Reagan administration has followed the pattern of previous administrations in situations in which the Congress might apply the War Powers Resolution. The Reagan administration's record of compliance will provide the final insight into how war powers will be shared in this and future administrations, whether Republican or Democratic.

The Reagan administration's first war powers confrontation concerned introduction of US armed forces into El Salvador as "advisers." Congress asserted that the El Salvador situation required compliance with the Resolution and criticized the administration for failing to consult properly the Congress before committing the advisers. The State Department argued that the US armed forces in El Salvador had not been involved in actual or imminent hostilities.

Furthermore, the advisers were not equipped for combat and would be armed only with personal sidearms. They would not go on patrol with Salvadoran forces or otherwise be placed in situations where combat was likely. Therefore, Section 8(c) of the Resolution, dealing with combat advisers, was not pertinent. The Reagan administration probably is on solid legal ground in contending that the War Powers Resolution required neither consultation nor a formal report on US military activities in El Salvador. However, as we discussed in the second chapter, "Constitutional Issues" (page 12), a group of congressmen filed suit in the United States District Court for the District of Columbia seeking to force President Reagan to withdraw all US troops from El Salvador and end military aid to that country.[26] The court, in *Crockett v. Reagan,* dismissed the suit, ruling that the Congress, not the court, must decide whether US forces in El Salvador are involved in actual or imminent hostilities. The court also noted that the Congress had

taken no action by joint resolution or other legislative means to show it believed that the President's actions were subject to the War Powers Resolution.

More Formal Report Given President Reagan reported on March 19, 1982, that US military personnel would be used as part of the Multinational Forces and Observers (MFO) to help execute the peace treaty between Egypt and Israel, a product of the 1979 Camp David accord. When the United Nations was unable to provide the MFO the United States agreed to provide ground troops for this purpose. Seeking a resolution of endorsement during 1981, the Reagan administration committed itself to reporting under Section 4(a)(2) of the Resolution immediately on the introduction of US forces into the Sinai.[27] President Reagan submitted a formal war powers report to the Congress within two days after US forces arrived in Israel. Significantly, the President submitted a more formal report rather than "taking note" of the Resolution as President Ford had done. President Reagan reported "consistent with Section 4(a)(2) of the War Powers Resolution."[28] Some observers contended that, in this instance, the situation demonstrated the contemporary importance of the War Powers Resolution, and that the President "gave implicit recognition to that importance by filing the report."[29]

On August 21, 1982, President Reagan reported the deployment of 800 marines to serve in the multinational force (MNF) to assist the Palestine Liberation Front to withdraw from Lebanon. The administration took the position that the marines had been invited by the Lebanese government and all parties agreed, so US forces were not being introduced into actual or imminent hostilities. Therefore, any reporting would be under Section 4(a)(2), the "equipped for combat" provision. House Foreign Affairs Committee Chairman Clement Zablocki challenged the President on this point; he contended that this report would not accurately reflect the danger in Beirut and would deprive the Congress of its authority to determine the maximum length of the deployment.[30] When

filed the report claimed to be consistent with the War Powers Resolution, but it cited no specific section of the Resolution. Again, the President relied on his constitutional authority in the conduct of Foreign Relations and as Commander in Chief of the US Armed Forces.[31]

A State Department official gave three reasons for why no specific section of the Resolution was cited. The first two were that the administration planned to withdraw the marines within 30 days, and that the US forces would be in no danger of hostilities. The third reason was that because Chairman Zablocki preferred that the administration not report under the "equipped for combat" provision, the War Powers Resolution did not require any other specific citation.[32]

Reagan Consistent with Ford and Carter Consistent with the precedent established in the reports of Presidents Ford and Carter, President Reagan's report expressed his desire that Congress be fully informed in the matter, and did not admit the constitutionality of the Resolution. He merely was submitting a report that met the Resolution's terms—one that was "consistent with," rather than in conformity to it.

On September 29, 1982, President Reagan reported that a Marine contingent of 1,200 men was to be used as part of a temporary MNF to help restore the Lebanese government. At the time the President reported "consistent with" the War Powers Resolution. The marines were to serve for an unspecified time as an "interposition force" which would "not engage in combat."[33] They would, however, be equipped to exercise the right of self-defense. As in the past, the President stated that the deployment was within his constitutional authority to conduct foreign affairs and as Commander in Chief.

The Congress initially accepted the role of the marines in Lebanon. However, various members began to criticize

procedural aspects, and they were especially concerned that the circumstances clearly indicated imminent involvement in hostilities. By not reporting under Section 4(a)(1) or promising to remove the marines by a specified date President Reagan had deprived the Congress of its right to force a withdrawal after 60 or 90 days.[34] Chairman Zablocki believed that the marines were entering a hostile area; therefore, President Reagan's failure to specify Section 4(a)(1) undermined the "integrity of the law" and contributed to a possible "constitutional crisis."[35] However, given later events we can well appreciate congressional and public concern about the safety and welfare of the deployed marines. President Reagan sent a second report on August 30, 1983, after the marines had been fired on and two had been killed.

Marine Deployment Supported The decision by the President not to submit a report under Section 4(a)(1) was consistent with prior administrations. However, some members of Congress believed that the United States was in a situation very close to hostilities and unfortunately the tragedy that followed proved them correct. As a consequence the President's decision to consult with the Congress during both deployments became a critical factor. Because a hostile situation did develop Congress could have attempted to withdraw the troops by concurrent resolution under Section 5(c). But due to the prior consultation the Congress supported the President's decision to deploy the marines.

President Reagan filed three reports under the War Powers Resolution. Not once did he report that the forces were being introduced into actual or imminent hostilities as provided for in Section 4(a)(1). After much debate Congress passed the Multinational Force in Lebanon Resolution (see appendixes B and C) which invoked Section 4(a)(1) of the War Powers Resolution as of August 29, 1983, and authorized the participation of marines in the MNF for 18 months.[36] Styled as a "delicate compromise" between the Reagan administration and

congressional leaders, the compromise invoked key sections of the War Powers Resolution for the first time since it was enacted into law.[37] Those provisions required the President to seek congressional authorization for the deployment of US forces in hostile situations for more than 60 or 90 days.

In exchange, the administration was able to head off legislative attempts to force an immediate withdrawal of the marines, while it obtained congressional approval for the marines to remain in Lebanon as part of the MNF for 18 months. In essence, the compromise required the President to sign a joint resolution invoking the War Powers Resolution with an 18-month limit on troop deployment. For his part the President would declare in writing that he did not recognize the constitutionality of the War Powers Resolution. He also asserted that he retained his constitutional authority, as Commander in Chief, to deploy US forces as he saw fit. The compromise did not answer the question of what would happen at the end of this 18-month period if the marines were still in place. However, it did avoid a constitutional confrontation over Congress's power to force the President to withdraw US forces from hostilities abroad.[38]

The Lebanese compromise (appendix B) provided that US forces in the MNF were engaged in "hostilities," which required authorization for their continued presence under terms of the War Powers Resolution. The compromise also provided that Congress had invoked the requirements of Section 4(a)(1) of the War Powers Resolution effective August 29, 1983, when two marines were killed in Lebanon. Therefore, it authorized the President, for the purpose of Section 5(b) of the War Powers Resolution, to keep US armed forces in the MNF in Lebanon for 18 months. It also permitted US forces to use such protective measures as they thought necessary to protect the MNF.

Collective Judgment Applies The War Powers Resolution ensures that the collective judgment of both the Congress and the President applies to introduction of US armed forces into actual or imminent hostilities and to the continued use of those forces in hostilities. Congress met this purpose when it invoked the War Powers Resolution, something it had done for the first time since the Resolution's enactment. In so doing Congress culminated the carefully negotiated compromise between the President and congressional leaders.

Although some hailed it as a victory for Congress, since this was the first administration to have acknowledged the War Powers Resolution, such is not the case. The compromise merely avoided a constitutional confrontation over Congress's power to force the President to withdraw US troops from hostilities in oversea areas; the administration did not concede the constitutionality of the War Powers Resolution. The President neither had sought congressional authorization nor had reported to Congress under provisions of the War Powers Resolution and, so, reserved his prerogatives as Commander in Chief. He also was hesitant about provisions of the Multinational Force in Lebanon Resolution (appendix B) because it invoked Section 4(a)(1) of the War Powers Resolution as of August 29, 1983.[39] In his view (appendix C),

> the initiation of isolated or infrequent acts of violence against the United States Armed Forces does not necessarily constitute actual or imminent involvement in hostilities....[40]

He also was concerned about some of the specific congressional reservations in the resolution, citing "historic differences between the Legislative and Executive Branches of government with respect to the wisdom and constitutionality of Section 5(b) of the War Powers Resolution."[41]

Every President has found unconstitutional the provision that automatically withdraws US forces as a result of inaction

by the Congress. Therefore, by signing the War Powers Resolution into law the President gave up none of the authority vested in him under the Constitution as President and as Commander in Chief. Furthermore, he cautioned that his approval was not

> acknowledgement that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in Section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired, or that Section 6 of the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy United States Armed Forces.[42]

Consequently, the President continued the precedent set by his predecessors and refused to acknowledge the applicability of the War Powers Resolution. However, as part of the compromise agreement which led to the Multinational Force in Lebanon Resolution (appendix B), President Reagan agreed that if US forces needed to remain in Lebanon beyond the 18-month period he intended "to work together with the Congress with a view toward taking action on mutually acceptable terms."[43]

Although neither side felt it compromised its war powers, both branches of government nevertheless "shared" the decision to maintain the US Marine presence in Lebanon. Given the tragic events that followed this joint decision in early October may well have forestalled a concerted effort in the Congress to invoke the War Powers Resolution and call for the immediate withdrawal of all US forces in Lebanon. Such an effort would have begun the long-feared "constitutional crisis" so carefully avoided in the 10 years during which the War Powers Resolution has been law.

House Rejects Withdrawal of Marines No doubt the compromise resolution was the main reason the House rejected (153-274), on November 2, 1983, a requirement to withdraw the marines early in 1984. It also is why Senate Democrats were unable to force a vote on a proposal introduced on October 26, 1983, as S Res. 253 to replace the marines with a United Nations or some other "neutral" force.[44] Nevertheless, the Congress gained an advantage as a result of the compromise: it now realizes it can set the clock running under the War Powers Resolution even if the President refuses to give the appropriate notice under the proper section of the Resolution.

In another instance, President Reagan reported deployment of Advanced Warning and Control System (AWACS) aircraft and F-15 fighters to assist forces in Chad. The report was submitted "consistent with" Section 4 of the War Powers Resolution. The President cited his constitutional authority as Commander in Chief and with respect to his role as Chief Executive in foreign affairs matters.

The administration's military activities in Central America also raised the issue of the War Powers Resolution. President Reagan had not reported joint training exercises in Central America and the Caribbean in August 1983 because he characterized the maneuvers as routine exercises regularly conducted with Latin American countries since 1955. Nevertheless, the questions arose of whether the US forces were being introduced into actual or imminent hostilities, and whether the maneuvers should have been reported under Section 4(a)(1). A report under Section 4(a)(1) would have triggered the 60-90 day time limit requiring withdrawal of the forces, unless Congress specifically authorized them to remain. Other questions concerned whether the maneuvers should have been reported under Sections 4(a)(2) or 4(a)(3), which require reporting but do not trigger any time limits. The final issue concerned whether the Section 3 requirement to consult with Congress before introducing troops into actual

or imminent hostilities applied. However, as we previously stated, the President did not believe these exercises fell within the War Powers Resolution and did not report them to the Congress.

Grenada Deployment Ordered On October 25, 1983, President Reagan advised the Speaker of the House and the President Pro Tempore of the Senate that he had deployed approximately 1,900 marines and Army airborne troops into Grenada. The deployment was ordered under the President's constitutional authority to conduct foreign affairs and as Commander in Chief and was reported by him in accordance with his "desire that the Congress be informed in this matter, and consistent with the War Powers Resolution."[45]

The landing had the following two purposes:

- To join the Organization of Eastern Caribbean States' collective security forces, at their request, to restore law, order, and government to the island of of Grenada.

- To help protect and evacuate US citizens.[46]

Approximately 1,000 US citizens, mostly students, were reported to be on the island and concern existed that they might be harmed or taken hostage.[47] Most significantly, US citizens were in danger, and the legal authority for the action to secure and evacuate the Americans cited well-established principles of international law regarding the protection of one's citizens.[48]

In reporting to the Congress, President Reagan stated that he was acting "consistent with" the War Powers Resolution but was not citing Section 4(a)(1), which would apply when troops are introduced into actual or imminent hostilities. Therefore, his report did not trigger Section 5(b) which would have withdrawn troops at the end of 60 to 90 days if Congress

failed to authorize their continued presence. Obviously, the President continued to have reservations about the propriety and constitutionality of Section 5(b) and whether the War Powers Resolution applied to a "rescue" operation. Although Section 3 of the Resolution requires consultation "in every possible instance" prior to introducing US forces into hostilities, President Reagan met with several congressional leaders only the evening before the landing.[49] Apparently, at the time of the meeting, the President already had ordered the operation to begin, and believed that military security requirements limited the "consultation."

Grenada Triggers 60-Day "Clock" The initial congressional response was a joint resolution from the House (H.J. Res 402) that declared that sending troops into Grenada triggered Section 4(a)(1) of the War Powers Resolution. This section would require that US forces be withdrawn after 60 days unless Congress authorized their continued presence under Section 5(b) of the Resolution.[50] This event was only the second time that the House moved to start the war powers "clock" running. The Senate then adopted the language in H.J. Res 402 as an amendment to a bill to raise the Federal debt ceiling, but the bill failed to pass the Senate.[51] As a joint resolution H.J. Res 402 would have required either the President's signature or veto and was intended to trigger the War Powers Resolution because the President refused to declare the Resolution in effect when he reported to the Congress.

Congressional leadership did not wish to force the War Powers Resolution issue. They realized that the public strongly supported President Reagan's action—which by all accounts was a military success—and that US combat forces probably would be removed within 60 days. Members of congress also were aware that Presidents had claimed authority under the Constitution to rescue American citizens endangered abroad. This point bad been conceded 10 years ago, when the Senate version of the War Power Resolution listed the rescue of

endangered US citizens as one of the instances in which a President could act under his authority as Commander in Chief.[52] Congressional reaction to the President's use of troops to rescue the US citizens in Grenada was a reaffirmation of the right of a President to act in such circumstances.

PRESIDENTIAL CONSTRAINT, CONGRESSIONAL COMPACT

THE CONTROVERSY CONTINUES over the limits of the "war powers" of the Congress and the President. On the surface, the War Powers Resolution has fueled the debate. The Congress continues to argue that it has the power to limit presidential use of military force abroad as a "necessary and proper" part of its powers to declare war and to provide for and regulate the armed forces. Presidents, ostensibly ignoring the War Powers Resolution, argue that as Commander in Chief they have independent powers to utilize military forces to further US interests and that these powers are not subject to significant congressional limitation.

Neither branch of government is likely to give in to any limitation on its perceived "war powers." Both claim the support of the Constitution, and each is provided constitutional powers which, if standing alone, would support a claim to final authority. Nor are the courts likely to impose limitations because, under the political question doctrine, they are reluctant to intervene in areas where both branches of government have significant and overlapping powers under the Constitution. Nevertheless, precedents suggest that the precise balance of power between the Congress and the President cannot be measured by constitutional rules; rather, the balance at any point in time is a reflection of political reality.

Resolution Remains Intact As a symbol of Congress's reassertion of its authority, the War Powers Resolution re-

mains intact. Despite initial doubts about the constitutionality of its key provisions—doubts which the Supreme Court has confirmed in its *Chadha* decision—Congress refuses to amend or alter any provisions of the War Powers Resolution. Perhaps Congress believes that the very existence of the Resolution, whether applied in practice or not, adds validity to its symbolic importance. Whatever the explanation, Congress still maintains that the War Powers Resolution is binding in all respects. Furthermore, by remaining unchanged, the War Powers Resolution constantly reminds Presidents of the circumstances in which it was enacted.

As we have shown, serious defects exist in the War Powers Resolution. For example, it does not acknowledge the President's independent constitutional authority as Commander in Chief to rescue endangered US citizens abroad, even though Congress does. Since enactment of the War Powers Resolution each President has exercised this authority without ever being seriously challenged by the Congress.

Chadha Voids "Legislative Veto" In another area the *Chadha* decision significantly affects the War Powers Resolution and voids its "legislative veto" provision. Congress no longer can deprive the President of his Commander in Chief powers simply by passing a concurrent resolution calling for the withdrawal of US forces. Congress, then, overcame this defect in the War Powers Resolution with a separate provision of law that requires a joint resolution or bill to direct the removal of US troops that are engaged in hostilities abroad without specific congressional authorization. But the Congress has yet to review its position that by silence or inaction over a specified time it can deprive the President of his constitutional authority as Commander in Chief.

If its problems were corrected the War Powers Resolution could represent a compact between the Congress and the President for sharing constitutional war powers. So Congress

should amend the War Powers Resolution as we recommend to eliminate the major constitutional defects. When enacted into law with the President's signature the amendment further would serve as a symbol of cooperation between the two branches of government. Realistically, it would guarantee the collective judgment of both the Congress and the President in the use of US military forces abroad.

For the reasons we discussed above Presidents will continue to order US forces into hostilities based on their interpretation of their constitutional authority as Commander in Chief. They will not formally acknowledge the War Powers Resolution; they will leave the Congress to invoke the Resolution by joint resolution or other legislative measure subject to presidential veto. The courts will refuse to intervene because the matter involves a "political question" between the two political branches of government. As events in the Reagan administration have shown, the Congress will be at a distinct disadvantage if it tries to terminate US involvement in hostilities over the objection of the President, especially during the first weeks and months when the President normally will dominate public opinion.

Role of Congress Unclear Congress is determined to play a role in the use of US military forces, although the precise nature of that role is unclear. The experiences of the Mayaguez, and in Iran, Grenada, and Lebanon suggest that congressional support or criticism of presidential use of force reflects the success or failure of the mission, and the public's reaction, rather than how much Congress is involved in the decisionmaking. Successful missions do not provoke serious congressional concern over such matters as how much the President complies with the technicalities of the War Powers Resolution.

Because Congress is a representative body, finding its proper role in foreign policy sometimes is difficult. For example, public debate serves little useful purpose when it concerns

the secret deployment of American forces, or when events are changing so rapidly that quick, decisive action is required to deal with them. Public debate after deployment of US forces can hurt the troops' morale if it indicates that US support for the risk they have taken is unsettled, and it signals the enemy that US resolve is weak. Time limits on accomplishing military or foreign policy objectives also serve to increase the risk for military forces and the odds against achieving US policy objectives. Additionally, arbitrary time constraints could force the President and military leaders to take operational risks that otherwise would be considered unnecessary. Such constraints also could provide moral support to the enemy and lead him to refuse to negotiate in the belief that time is on his side. These moves and other adverse consequences caution against using the War Powers Resolution as a practical means for Congress to reassert its constitutional "war powers" authority.

Use of Force Depends on Public Support We recognize that the President's ability to deploy military forces for sustained periods depends on his ability to convince the country of the merits of his policies. It is a political fact that even when a President receives early support for his action his ability to sustain the use of military force depends on the long-term support of the American public. Pressure brought to bear by the weight of public opinion will prove more effective than procedural devices such as the War Powers Resolution. As the decade of experience with the Resolution has shown, Congress has been unable to prevent presidential use of military force on constitutional grounds. To the contrary, political realities of the moment have operated to control what Presidents perceive to be their inherent war powers.

The recently concluded compromise regarding US forces in Lebanon illustrates this point. The Congress claims that the War Powers Resolution was invoked, although Congress itself had to start the clock running by a joint resolution. The President gained the concession from Congress that a joint resolu-

tion rather than a concurrent resolution now is necessary to involve the War Powers Resolution. Finally, the compromise avoided a "constitutional crisis." However, the political question still remains regarding the limits of the constitutional war powers of both the President and the Congress.

In the final analysis the War Powers Resolution will continue to act as a constraint on the President's ability to wage prolonged undeclared war. As a symbol of congressional interest in war, peace, and foreign affairs it will continue to remind both the Congress and the President that each has a legitimate role in those matters; however, the constitutional issues will remain. Little likelihood exists that the War Powers Resolution will be repealed or that those issues will be resolved by the courts.

Presidents will continue to deploy military forces consistent with the precedent established by Presidents Ford, Carter, and Reagan. The war powers disputes between the President and the Congress will continue to be resolved through accord and compromise. Accommodations will be made between the President's constitutional authority as Commander in Chief and the Congress's constitutional responsibility to declare war and to maintain America's armed forces.

From time to time the balance of actual power may shift to the President or the Congress. However, this shift will be determined by the political realities of the moment, not by abstract constitutional law that exactly sets the war powers of either the Congress or the President.

APPENDIX A

THE WAR POWERS RESOLUTION

Public Law 93-148

JOINT RESOLUTION

November 7, 1973
[H. J. Res. 542]

Concerning the war powers of Congress and the President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

War Powers Resolution.

SHORT TITLE

SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

SEC. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

USC prec. title 1.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

SEC. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

SEC. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of

war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

SEC. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

SEC. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within

three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

SEC. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

59 Stat. 1031.

"Introduction of United States Armed Forces."

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

SEPARABILITY CLAUSE

SEC. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

SEC. 10. This joint resolution shall take effect on the date of its enactment.

CARL ALBERT
Speaker of the House of Representatives.

JAMES O. EASTLAND
President of the Senate pro tempore.

IN THE HOUSE OF REPRESENTATIVES, U.S.,
November 7, 1973.

The House of Representatives having proceeded to reconsider the resolution (H. J. Res. 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said resolution pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

W. PAT JENNINGS
Clerk.

I certify that this Joint Resolution originated in the House of Representatives.

W. PAT JENNINGS
Clerk.

IN THE SENATE OF THE UNITED STATES
November 7, 1973.

The Senate having proceeded to reconsider the joint resolution (H. J. Res. 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections to the House of Representatives, in which it originated, it was

Resolved, That the said joint resolution pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

FRANCIS R. VALEO
Secretary.

APPENDIX B

MULTINATIONAL FORCE IN LEBANON RESOLUTION

Public Law 98-119
98th Congress

Joint Resolution

Providing statutory authorization under the War Powers Resolution for continued United States participation in the multinational peacekeeping force in Lebanon in order to obtain withdrawal of all foreign forces from Lebanon.

Oct. 12, 1983
[S.J. Res. 159]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

Multinational Force in Lebanon Resolution.

SHORT TITLE

SECTION 1. This joint resolution may be cited as the "Multinational Force in Lebanon Resolution". 50 USC 1541 note.

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that— 50 USC 1541 note.

(1) the removal of all foreign forces from Lebanon is an essential United States foreign policy objective in the Middle East;

(2) in order to restore full control by the Government of Lebanon over its own territory, the United States is currently participating in the multinational peacekeeping force (hereafter in this resolution referred to as the "Multinational Force in Lebanon") which was established in accordance with the exchange of letters between the Governments of the United States and Lebanon dated September 25, 1982;

(3) the Multinational Force in Lebanon better enables the Government of Lebanon to establish its unity, independence, and territorial integrity;

(4) progress toward national political reconciliation in Lebanon is necessary; and

(5) United States Armed Forces participating in the Multinational Force in Lebanon are now in hostilities requiring authorization of their continued presence under the War Powers Resolution.

(b) The Congress determines that the requirements of section 4(a)(1) of the War Powers Resolution became operative on August 29, 1983. Consistent with section 5(b) of the War Powers Resolution, the purpose of this joint resolution is to authorize the continued participation of United States Armed Forces in the Multinational Force in Lebanon. 50 USC 1541 note. 50 USC 1543. 50 USC 1544.

(c) The Congress intends this joint resolution to constitute the necessary specific statutory authorization under the War Powers Resolution for continued participation by United States Armed Forces in the Multinational Force in Lebanon.

PUBLIC LAW 98-119—OCT. 12, 1983

AUTHORIZATION FOR CONTINUED PARTICIPATION OF UNITED STATES ARMED FORCES IN THE MULTINATIONAL FORCE IN LEBANON

50 USC 1541 note.
50 USC 1544.

SEC. 3. The President is authorized, for purposes of section 5(b) of the War Powers Resolution, to continue participation by United States Armed Forces in the Multinational Force in Lebanon, subject to the provisions of section 6 of this joint resolution. Such participation shall be limited to performance of the functions, and shall be subject to the limitations, specified in the agreement establishing the Multinational Force in Lebanon as set forth in the exchange of letters between the Governments of the United States and Lebanon dated September 25, 1982, except that this shall not preclude such protective measures as may be necessary to ensure the safety of the Multinational Force in Lebanon.

REPORTS TO THE CONGRESS

50 USC 1541 note.
50 USC 1543.

SEC. 4. As required by section 4(c) of the War Powers Resolution, the President shall report periodically to the Congress with respect to the situation in Lebanon, but in no event shall he report less often than once every three months. In addition to providing the information required by that section on the status, scope, and duration of hostilities involving United States Armed Forces, such reports shall describe in detail—

(1) the activities being performed by the Multinational Force in Lebanon;

(2) the present composition of the Multinational Force in Lebanon, including a description of the responsibilities and deployment of the armed forces of each participating country;

(3) the results of efforts to reduce and eventually eliminate the Multinational Force in Lebanon;

(4) how continued United States participation in the Multinational Force in Lebanon is advancing United States foreign policy interests in the Middle East; and

(5) what progress has occurred toward national political reconciliation among all Lebanese groups.

STATEMENTS OF POLICY

50 USC 1541 note.

SEC. 5. (a) The Congress declares that the participation of the armed forces of other countries in the Multinational Force in Lebanon is essential to maintain the international character of the peacekeeping function in Lebanon.

(b) The Congress believes that it should continue to be the policy of the United States to promote continuing discussions with Israel, Syria, and Lebanon with the objective of bringing about the withdrawal of all foreign troops from Lebanon and establishing an environment which will permit the Lebanese Armed Forces to carry out their responsibilities in the Beirut area.

(c) It is the sense of the Congress that, not later than one year after the date of enactment of this joint resolution and at least once a year thereafter, the United States should discuss with the other members of the Security Council of the United Nations the establishment of a United Nations peacekeeping force to assume the responsibilities of the Multinational Force in Lebanon. An analysis of the implications of the response to such discussions for the continuation of the Multinational Force in Lebanon shall be

included in the reports required under paragraph (3) of section 4 of this resolution.

DURATION OF AUTHORIZATION FOR UNITED STATES PARTICIPATION IN THE MULTINATIONAL FORCE IN LEBANON

SEC. 6. The participation of United States Armed Forces in the Multinational Force in Lebanon shall be authorized for purposes of the War Powers Resolution until the end of the eighteen-month period beginning on the date of enactment of this resolution unless the Congress extends such authorization, except that such authorization shall terminate sooner upon the occurrence of any one of the following: 50 USC 1541 note. 50 USC 1541 note.

(1) the withdrawal of all foreign forces from Lebanon, unless the President determines and certifies to the Congress that continued United States Armed Forces participation in the Multinational Force in Lebanon is required after such withdrawal in order to accomplish the purposes specified in the September 25, 1982, exchange of letters providing for the establishment of the Multinational Force in Lebanon; or

(2) the assumption by the United Nations or the Government of Lebanon of the responsibilities of the Multinational Force in Lebanon; or

(3) the implementation of other effective security arrangements in the area; or

(4) the withdrawal of all other countries from participation in the Multinational Force in Lebanon.

INTERPRETATION OF THIS RESOLUTION

SEC. 7. (a) Nothing in this joint resolution shall preclude the President from withdrawing United States Armed Forces participation in the Multinational Force in Lebanon if circumstances warrant, and nothing in this joint resolution shall preclude the Congress by joint resolution from directing such a withdrawal. 50 USC 1541 note.

(b) Nothing in this joint resolution modifies, limits, or supersedes any provision of the War Powers Resolution or the requirement of section 4(a) of the Lebanon Emergency Assistance Act of 1983, relating to congressional authorization for any substantial expansion in the number or role of United States Armed Forces in Lebanon. 50 USC 1541 note. *Ante*, p. 215.

CONGRESSIONAL PRIORITY PROCEDURES FOR AMENDMENTS

SEC. 8. (a) Any joint resolution or bill introduced to amend or repeal this Act shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be. Such joint resolution or bill shall be considered by such committee within fifteen calendar days and may be reported out, together with its recommendations, unless such House shall otherwise determine pursuant to its rules. 50 USC 1541 note.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days

thereafter, unless such House shall otherwise determine by the yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by the yeas and nays.

Committee of conference.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such joint resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within forty-eight hours, they shall report back to their respective Houses in disagreement.

Conference reports.

Approved October 12, 1983.

APPENDIX C

PRESIDENTIAL STATEMENT REGARDING THE MULTINATIONAL FORCE IN LEBANON RESOLUTION

PRESIDENT SIGNS MFN IN LEBANON RESOLUTION

PRESIDENT'S STATEMENT,
OCT. 12, 1983[1]

I am pleased to sign into law today S.J. Res. 159, the Multinational Force in Lebanon Resolution.[2] This resolution provides important support for the U.S. presence and policies in Lebanon and facilitates the pursuit of U.S. interests in that region on the bipartisan basis that has been the traditional hallmark of American foreign policy. In my view, the participation and support of the Congress are exceedingly important on matters of such fundamental importance to our national security interests, particularly where U.S. Armed

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1. Text from Weekly Compilation of Presidential Documents of Oct. 17, 1983.
2. As enacted S.J. Res. 159 is Public Law 98-199, approved Oct. 12.

Forces have been deployed in support of our policy objectives abroad. I am grateful to those of both political parties who joined in the expression of resolve reflected by the enactment of this resolution, and especially to the bipartisan leadership of Senate Majority Leader Baker, House Speaker O'Neill, House Foreign Affairs Committee Chairman Zablocki, and Senate Foreign Relations Committee Chairman Percy.

The text of this resolution states a number of congressional findings, determinations, and assertions on certain matters. It is, of course, entirely appropriate for Congress to express its views on these subjects in this manner. However, I do not necessarily join in or agree with some of these expressions. For example, with regard to the congressional determination that the requirements of section 4(a)(1) of the War Powers Resolution became operative on August 29, 1983, I would note that the initiation of isolated or infrequent acts of violence against U.S. Armed Forces does not necessarily constitute actual or imminent involvement in hostilities, even if casualties to those forces result. I think it reasonable to recognize the inherent risk and imprudence of setting any precise formula for making such determinations.

However, complete accord on such debatable issues is less important than the process that has taken place and the bipartisan policy goals that have been articulated. We must not let disagreements on interpretation or issues of institutional powers prevent us from expressing our mutual goals to the citizens of our nation and the world. I, therefore, sign this resolution in full support of its policies but with reservations about some of the specific congressional expressions.

There have been historic differences between the legislative and executive branches of government with respect to the wisdom and constitutionality of Section 5(b) of the War Powers Resolution. That section purports to require termination of the use of U.S. Armed Forces in actual hostilities or situations in which imminent involvement in hostilities is clearly indicated by the circumstances unless Congress, within 60 days, enacts a specific authorization for that use or otherwise extends the 60-day period. In light of these historic differences, I would like to emphasize my view that the imposition of such arbitrary and inflexible deadlines creates unwise limitations on

Presidential authority to deploy U.S. forces in the interests of U.S. national security. For example, such deadlines can undermine foreign policy judgments, adversely affect our ability to deploy U.S. Armed Forces in support of these judgments, and encourage hostile elements to maximize U.S. casualties in connection with such deployments.

I believe it is, therefore, important for me to state, in signing this resolution, that I do not and cannot cede any of the authority vested in me under the constitution as President and as Commander in Chief of U.S. Armed Forces. Nor should my signing be viewed as any acknowledgment that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in Section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired, or that Section 6 of the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy U.S. Armed Forces. Let me underscore, however, that any differences we may have over institutional prerogatives will in no way diminish my intention to proceed in the manner outlined in my letter of September 27, 1983, to achieve the important bipartisan goals reflected in this resolution.

Indeed, I am convinced that congressional support for the continued participation of U.S. forces alongside those of France, Italy, and the United Kingdom helped bring about the recent cease-fire and the start of the reconciliation process in Lebanon. The security and the stability of the Beirut area and the successful process of national reconciliation are essential to the achievement of U.S. policy objectives in Lebanon, as stated in the resolution. It is my fervent hope and belief that this reaffirmation of the support of the executive and legislative branches for the Government of Lebanon and for our partners in the multinational force will promote a lasting peace and hasten the return home of our armed forces.

END NOTES

PRESIDENT VERSUS CONGRESS: WAR POWER DEBATE

1. Public Law No. 93–148, Nov. 7, 1973, 87 Stat. 550–560. (The text of the War Powers Resolution is at Appendix A.)

2. Richard Haas, "Congressional Power: Implications for American Security Policy," *The International Institute for Strategic Studies,* 1979, p. 19.

3. Richard Nixon, "Veto of War Powers Resolution (Oct. 24, 1973)" in 69 *Department of State Bulletin,* No. 1796, 1976, p. 662.

4. 462 U.S.___, 103 S. Ct. 2764 (1983); and 463 U.S.___, 103 S. Ct. 3556 (1983).

5. A.M. Egeland, Jr., "Presidential Functions," *Reporter,* Vol. 10, No. 5, Oct. 1981, p. 159; also see *Prize Cases,* 67 U.S. (2 Black) 635 (1863).

6. William P. Rogers, "Congress, the President, and the War Powers," 59 *California Law Review,* 1971, pp. 1209–10.

7. *Durand v. Holland,* 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860). (Recognizing the Executive's emergency power and duty to respond to threats against the lives of American citizens abroad); also see *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 79 (1863).

8. J. Terry Emerson, "The War Powers Resolution Tested: The President's Independent Defense Powers," 51 *Notre Dame Lawyer,* 1975, pp. 195, 198.

9. *United States v. Curtiss Wright Export Corp.,* 299 U.S. 304, 319–320 (1936).

10. "Authority of the President to Repel the Attack in Korea," Department of State Memorandum of July 3, 1950, 23 *Department of State Bulletin*, No. 173, 1950, pp. 173–178. Though relying on the Commander in Chief authority of the President to direct the movements of the military forces placed by law at his command, the memorandum also noted that the President is charged with the duty of conducting the foreign relations of the United States, a field in which he "alone has the power to speak or listen as a representative of the Nation," citing *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936). The memorandum cited 85 instances in which, on orders of the Commander in Chief and *without* congressional authorization, the President acted to prevent violent and unlawful acts in other countries from depriving the United States and its nationals of the benefits of peace and security.

11. Congress, Senate, Committee on Foreign Relations, *Powers of the President to Send the Armed Forces Outside the United States*, Committee Print (Washington, DC: US Government Printing Office, 1951), p. 1.

12. Ibid., p. 7.; also see Raymond Celada, "Is An American Entebbe-Like Rescue Legally Possible?" U.S. Senate, 122 *Congressional Record*, 1976, pp. 33403–07. This legal memorandum was prepared by the Congressional Research Service for a Senator who was concerned that the War Powers Resolution would prevent an American President from rescuing American citizens under circumstances similar to Entebbe. It did not matter whether such a rescue effort was conducted as an exercise of the President's authority as Commander in Chief or on authority delegated by statute—the Mayaguez episode stood as evidence that such rescue efforts were not out of the question.

13. Leonard G. Meeker, "The Legality of United States Participation in the Defense of Viet-Nam," *Department of State Bulletin*, March 28, 1966, pp. 474, 484–5. The opinion stated that "These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States." However, the legal basis for US participation in the defense of South Vietnam did not rest only on the constitutional power of the President under Article II. It also

was predicated on the Southeast Asia Collective Defense Treaty and the Tonkin Gulf Resolution.

14. "War Powers Resolution," Public Law No. 93–148, Nov. 7, 1973, 87 Stat. 555–560, Sections 2(a) and (b).

15. When we analyze the effectiveness of this mechanism to end US troop involvement before the expiration of the 60-day period, we must distinguish between a bill or joint resolution and a concurrent resolution. For all practical purposes no difference exists between a bill and a joint resolution. Each passes both Houses of Congress and is then sent to the President; if signed or passed over presidential veto, each becomes law. A concurrent resolution must pass both Houses of Congress, but it does not go to the President or have the force of law. The provision calling for withdrawal of troops on passage of a concurrent resolution deliberately was incorporated to avoid a possible presidential veto. This procedure has been used by Congress for years for a wide range of both domestic and foreign activities and recently was held to be unconstitutional by two decisions of the Supreme Court. (For an excellent analysis and argument against the legislative veto, see David A. Martin, "The Legislative Veto and the Responsible Exercise of Congressional Power," *Virginia Law Review*, Vol. 68, No. 2, 1982, pp. 253–302.)

16. *Department of State Bulletin*, November 26, 1973, pp. 662–3. In addition to finding certain provisions unconstitutional, President Nixon found the resolution to be an "attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years." Ibid., p. 662. The administration believed that as a practical consequence the resolution seriously would undermine the nation's ability to act decisively and convincingly in times of international crisis. The provision automatically cutting off certain authorities after 60 days unless extended by the Congress could work to intensify or prolong a crisis. As one commentator has observed, this provision "might encourage an enemy to be more recalcitrant in the hope that by holding out a few weeks longer, Congress would undercut the President's ability to prosecute the action. In such a situation, the President might conclude that it was necessary to make minor concessions and sacrifice substantial US interests in order to negotiate a quick truce and avoid the risk of having his Commander in Chief powers withdrawn and

losing everything to the enemy." Robert F. Turner, *The War Powers Resolution: Its Implementation in Theory and Practice* (Philadelphia: Foreign Policy Research Institute, 1983), p. 111.

17. *Durand v. Holland*, 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).

18. Congress, House, Committee on Foreign Affairs, *The War Powers Resolution of 1973*, Report to Accompany H.J. Res. 542, reprinted in US Congress, House, Committee on Foreign Affairs, Subcommittee on International Security and Scientific Affairs, *The War Powers Resolution: Relevant Documents, Correspondance, Reports*, Committee Print (Washington, DC: US Government Printing Office, 1981), pp. 31–36.

19. Ibid., p. 36. (Minority views of Representatives Frelinghuysen, Derwinski, Thompson, and Burke.)

20. John Tower, "Congress vs. The President: The Formulation and Implementation of American Foreign Policy," *Foreign Affairs*, Winter 1981/82, p. 238.

21. Senate, *Congressional Record*, July 1, 1980, p. S9092.

CONSTITUTIONAL ISSUES

1. *Immigration and Naturalization Service v. Chadha*, 462 U.S.___, 103 S. Ct. 2764 (1983), p. 2784 (cited in the text and notes as *Chadha*).

2. This view is echoed in Justice Powell's observation that "the Court's decision ... apparently will invalidate every use of the legislative veto." Ibid., p. 2788. Justice White, in his dissent, observed that the decision "sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto!' Ibid., p. 2792. In an appendix to his dissent Justice White listed legislative veto provisions potentially affected by the Court's decision. He included legislation pertaining to war powers, arms transfers

and sales, national emergency authorities, and nuclear nonproliferation.

3. 463 U.S.___, 103 S. Ct. 3556 (1983).

4. See generally Morton Rosenberg, "Summary and Preliminary Analysis of the Ramifications of *INS v. Chadha*, The Legislative Veto Case," Library of Congress, Congressional Research Service (Washington, DC: US Government Printing Office 1983); Raymond J. Celada, "Effect of the Legislative Veto Decision on the Two-House Disapproval Mechanism to Terminate U.S. Involvement in Hostilities Pursuant to Unilateral Presidential Action," memorandum in *The U.S. Supreme Court Decision Concerning the Legislative Veto*, Hearings, Congress, House, Committee on Foreign Affairs (Washington, DC: US Government Printing Office, 1983); Ellen C. Collier, Warren H. Donnelly, Richard F. Grimmett, and Larry Q. Nowles, "Foreign Policy Effect of the Supreme Court's Legislative Veto Decision," Library of Congress, Congressional Research Service, Issue Brief No. IB83123, Dec. 2, 1983 (Washington, DC: US Government Printing Office, 1983).

5. See generally "Statement of former Senator Jacob K. Javits on the War Powers Resolution," Senate, *Congressional Record*, July 22, 1983, S10680; Jacob K. Javits, "Who Decides on War?" *New York Times Magazine*, October 23, 1983, Section 6, pp. 92–108; Ronald G. Morgan, "The Impact of Chadha on the War Powers Resolution Legislative Veto: Are All Legislative Vetoes Unconstitutional?" Unpublished student submission to the *Dickinson Law Review*, 1983.

6. Ronald Morgan, "The Impact of Chadha on the War Powers Resolution Legislative Veto: Are All legislative Vetoes Unconstitutional?" supra, p. 20.

7. Ann Van Wyner Thomas and A.J. Thomas, Jr., "Presidential War-Making Power: A Political Question?" *Southwestern Law Journal*, Vol 35, 1981, pp. 879–80.

8. 5. U.S. (1 Cranch) 137 (1803) and 369 U.S. 186 (1962).

9. 369 U.S. 186 (1962), p. 217. To decide if a matter involves a political question the court considers whether—

(1) The issue is committed to a coordinate political department.
(2) It can find and use judicial standards to resolve the issue.
(3) It first must make nonjudicial policy to use in the decision.
(4) It can make an independent resolution and still show the respect due coordinate branches of government.
(5) It is unusually bound by a previous political decision.
(6) Potential embarrassment exists if various departments offer different opinions on the same question.

10. See, for example, *Holtzman v. Schlesinger*, 484 F. 2d 1307 (2d Cir. 1973), *cert. den.*, 416 U.S. 936 (1974); *accord, Atlee v. Richardson*, 411 U.S. 911 (1973), *aff'g*, 347 F. Supp. 689 (D.E.D. Pa 1972). The Supreme Court summarily affirmed the district court's dismissal on political question grounds of a suit challenging the constitutionality of US activities in Vietnam. This action indicates that war powers issues are political questions and are not for judicial resolution.

11. *Crockett v. Reagan,* 558 F. Supp 893, 898 (D.D.C. 1982).

12. Ibid., p. 899.

13. Senate, *Congressional Record*, Oct. 19, 1983, pp. S14163–65; Senate, *Congressional Record*, Oct. 20, 1983, pp. S14255–56, S14267–70.

14. Congress, House, *H.R. 2915 Authorizing Appropriations for Fiscal Years 1984 and 1985 for the Department of State, The U.S. Information Agency, the Board for International Broadcasting, The Inter-American Foundation, and the Asia Foundation, to Establish the National Endowment for Democracy and for Other Purposes*, Conference Report 98–563, 98th Congress, 1st Session, 1983, p. 83.

15. Senate, *Congressional Record*, October 19, 1983, S14163. Senator Byrd, the sponsor of the Senate amendment, agreed with the Supreme Court ruling in the *Chadha* case and believed it clearly indicates that the part of the War Powers Resolution which, by concurrent resolution, would withdraw troops is likely to be found unconstitutional.

16. John H. Sullivan *The War Powers Resolution: A Special Study of the Committee on Foreign Affairs*, Congress, House, Committee on Foreign Affairs (Washington, DC: Committee Print, 1982), pp. 264, 273. (Cited in the text and notes as the Sullivan Study.)

17. Raymond J. Celada, Senior Specialist in American Public Law, American Law Division, Congressional Research Service, "Effect of the Legislative Veto Decision on the Two-House Disapproval Mechanism to Terminate a Presidential Declaration of National Emergency," memorandum in *The U.S. Supreme Court Decision Concerning the Legislative Veto*, Hearings, Congress, House, Committee on Foreign Affairs (Washington, DC: US Government Printing Office, 1983), p. 367.

18. *Buckley v. Valeo*, 424 U.S. 1, 108 (1976); *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932).

19. *Chadha*, 103 S. Ct. 2764, 2774 (1983). The Court stated that the severability clause "gives rise to a presumption that Congress did not intend the Act as a whole . . . to depend upon whether the veto clause . . . was invalidated." The Court noted that invalid portions of an act are to be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not" (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)).

20. Ibid., p. 2774.

21. "War Powers Resolution," Public Law 93–148, Nov. 7, 1973. The Resolution provides in Section 9: "If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance should not be affected thereby." (Compare with Section 406 of the Immigration and Nationality Act, 8 U.S.C.1101, cited in *Chadha*.)

22. US Congress, House, Committee on Foreign Affairs, *The U.S. Supreme Court Decision Concerning the Legislative Veto*, Hearings, "Effect of the Legislative Veto Decision on the Two-House Disapproval Mechanism to Terminate U.S. Involvement in Hostilities Pursuant to Unilateral Presidential Action," memorandum by Raymond J. Celada, Senior Specialist in American Public Law, American Law Division, Congressional Research Service (Washington, DC: US Government Printing Office, 1983), p. 318.

23. Ibid.

24. Ibid. Also see "War Powers Resolution," Public Law 93–148, Section 8(d).

25. US Congress, House, Committee on Foreign Affairs, *War Powers Resolution of 1973* (Washington, DC: US Government Printing Office, 1973), pp. 11, 13–14.

26. 69 *Department of State Bulletin,* Nov. 26, 1973, p. 662.

27. *War Powers Resolution of 1973,* supra, p. 21.

28. "War Powers Resolution," Public Law 93–148, Section 2 (a).

29. Raymond J. Celada, "Effect of the Legislative Veto Decision on the Two-House Disapproval Mechanism to Terminate U.S. Involvement in Hostilities Pursuant to Unilateral Presidential Action," supra, pp. 321–2.

30. Ibid., pp. 322–23.

31. David A. Martin, "The Legislative Veto Decision and Congressional Response," Statement Before the Committee on Foreign Affairs, House of Representatives, July 21, 1983, cited in memorandum by Raymond J. Celada, supra in note 22, pp. 325–6.

PRESIDENTIAL COMPLIANCE

1. Robert F. Turner, *The War Powers Resolution: Its Implementation in Theory and Practice* (Philadelphia: Foreign Policy Research Institute, 1983) p. 47.

2. Sullivan Study, supra.

3. Ibid., pp. 176–77.

4. Ellen C. Collier, "War Powers Resolution: Presidential Compliance," Library of Congress, Congressional Research Service, Issue Brief IB81050, Nov. 22, 1983, p. 10.

5. Congress, House, Committee on Foreign Affairs, Subcommittee on International Security and Scientific Affairs, *The War Powers Resolution: Relevant Documents, Correspondence, Reports*, Committee Print (Washington, DC: US Government Printing Office, 1981), pp. 40–46. (Report dated April 4, 1975; Report dated April 12, 1975; Report dated April 30, 1975.)

6. Robert F. Turner, supra, p. 54, citing Gerald R. Ford, "The War Powers Resolution: Striking a Balance Between the Executive and Legislative Branches," speech delivered on April 11, 1977, at the University of Kentucky.

7. *The War Powers Resolution: Documents, Correspondance, Reports*, supra, pp. 45–46.

8. Sullivan Study, supra, pp. 211–12.

9. Ibid., p. 213.

10. Robert F. Turner, supra, p. 213, citing President Ford's speech at the University of Kentucky. The President gave the following seven reasons for his proposition that it is impossible to draw Congress into the decisionmaking process:

(**1**) Legislators have too many concerns to expect them to be well versed in fast-breaking developments.

(**2**) It is impossible to wait for a congressional concensus when its leadership may be scattered around the world.

(**3**) A risk exists of disclosure of sensitive communications.

(**4**) The delay required to consult with Congress may increase the emergency.

(**5**) It is questionable whether consultation with a few key members can bind the entire Congress to support a course of action.

(**6**) Congress has little to gain and much to lose politically by involving itself deeply in crisis management.

(**7**) Neither foreign policy nor military operations can be commanded by 535 members of Congress.

11. Sullivan Study, supra, p. 216.

12. Ibid., p. 220, citing statement submitted by State Department Legal Advisor Monroe Leigh during the Zablocki oversight hearings.

13. Ibid., p. 220.

14. Ellen C. Collier, supra, p. 12.

15. *Weekly Compilation of Presidential Documents,* Vol. 14, No. 21 (May 28, 1979), p. 971.

16. Sullivan Study, supra, p. 234, citing Zaire Airlift hearing, 95th Congress, 2d Sess (unpublished transcript), pp 32–33.

17. Representative Paul Finley contended that the operation had placed American servicemen in a situation of "imminent hostilities," and he introduced a concurrent resolution requesting that the President submit a report. No further action was taken on the resolution. (See Sullivan Study, supra, pp. 235–37.)

18. Report dated April 20, 1980, from President Jimmy Carter to Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives, contained in *The War Powers Resolution: Relevant Documents, Correspondence, Reports,* supra, p. 47.

19. Ibid., p. 48.

20. Ibid.

21. Sullivan Study, supra, p. 242.

22. Ibid., supra, p. 243.

23. Legal opinion of May 9, 1980, by Lloyd Cutler, the President's Counsel, contained in *The War Powers Resolution: Relevant Documents, Correspondance, Reports,* supra, p. 49.

24. Ibid.

25. Section 2(c) of the War Powers Resolution limits the exercise of constitutional powers of the President as Commander in Chief to

deploy troops into actual or imminent hostilities to situations where war has been declared, Congress has so authorized by statute, or a national emergency has been created by attack on the United States or its armed forces. No mention is made of rescuing hostages, protecting US citizens abroad, or conducting humanitarian missions.

26. Chapter on Constitutional Issues in this study, note 13 and accompanying text.

27. Sullivan Study, supra, pp. 268–69.

28. Quoted in Ellen C. Collier, supra, p. 10.

29. Sullivan Study, supra, p. 269.

30. *Congressional Quarterly,* August 28, 1982, p. 2158.

31. *Weekly Compilation of Presidential Documents,* August 30, 1982, pp. 1065–66.

32. *Congressional Quarterly,* August 28, 1982, p. 2158.

33. *Weekly Compilation of Presidential Documents,* October 4, 1982, p. 1232.

34. Robert F. Turner, supra, p. 86.

35. Ibid, citing *Washington Post,* Op-Ed, October 3, 1982.

36. Public Law 98–119, Oct. 12, 1983.

37. *Congressional Quarterly,* September 24, 1983, p. 1963.

38. Ibid., p. 1904.

39. Public Law 98–119, Oct. 12, 1983 (S.J. Res. 159).

40. Statement of President Reagan when he signed S.J. Res. 159 into law, quoted in *Congressional Quarterly,* Oct. 15, 1983, p. 2142.

41. Ibid.

42. Ibid.

43. President Reagan's Sept 27, 1983, letter to House Speaker Thomas P. O'Neill, Jr., cited in *Congressional Quarterly*, October 1, 1983, p. 2044.

44. *Congressional Quarterly*, November 5, 1983, p. 2288.

45. *Weekly Compilation of Presidential Documents*, October 31, 1983, p. 1494.

46. Ibid.

47. Ronald Reagan, "America's Commitment to Peace," address to the nation, Oct. 27, 1983, quoted in 83 *Department of State Bulletin*, Dec. 1983, p. 4.

48. Remarks Deputy Secretary of State Dam made before the Associated Press Managing Editors Conference, quoted in 83 *Department of State Bulletin*, Dec. 1983, pp. 79–81.

49. Ellen C. Collier, supra, p. 3.

50. US Congress, House, *Congressional Record*, Oct. 31, 1983, p. H8884.

51. *Congressional Quarterly*, Nov. 5, 1983, p. 2292.

52. Ellen C. Collier, supra, p. 3.

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